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Ng Kian Chong & Ors v Saw Seng Kee

HIGH COURT (TAIPING) — CIVIL APPEAL NOS 12-12-93(T) AND 12-13-93(T)
ABDUL MALIK ISHAK J
B 1 SEPTEMBER 1994

Civil Procedure *— Pleadings — Striking out writ and statement of claim — Delay in making application due to difficulty in gathering evidence — Whether application can be made at commencement of trial — Subordinate Courts Rules 1980 O 14 r 21(1)*

C ***Civil Procedure*** *— Parties — Proper parties to be sued — Purchase of invalid shares — Whether proper party was remisier or registrar of company issuing shares*

Civil Procedure *— Pleadings — Striking out writ and statement of claim — Whether no reasonable cause of action or frivolous or vexatious or an abuse of the process of court*

D ***Companies and Corporations*** *— Shares — Sale of shares — Shares invalid — Whether purchaser could sue remisier — Whether proper party was registrar of company which issued shares — Whether purchaser could apply for validation of shares — Companies Act 1965 s 63*

E The respondent entered into oral agreements with the first and second appellants, who were remisiers of the third appellant stockbroking company, to buy Pahang Investments Public Ltd Co ('PI') shares totalling RM95,127.15 from the first and second appellants. However, the respondent received shares from the Pahang Consolidated Co Ltd ('PC') instead. The respondent filed summonses F against the appellants alleging, inter alia, that it was an implied condition that the appellants would sell proper and valid PI shares but the PI shares were invalid and issued unlawfully; that they had warranted and represented that the PI shares were valid shares and were negligent and had perpetrated a fraud. In the appellants' defence, it was alleged, inter alia, that the appellants did not induce the G respondent to enter into the oral agreements by warranting and representing that the PI shares were valid as the respondent had entered into the oral agreements at his own behest and that alternatively, the first and second appellants had merely acted as intermediaries and it was the duty of PI to ensure that the shares H were valid. The appellants applied under O 14 r 21(1) of the Subordinate Courts Rules 1980 to strike out the statement of claim on the grounds that it did not disclose a reasonable cause of action, was frivolous and vexatious and otherwise an abuse of the process of the court. The respondent argued that as the appellants had delayed in making the application, it should not be allowed. The appellants' I application was dismissed by the sessions court and the appellants have appealed.

Held, allowing the appeals: A

(1) An application to strike out a pleading should be made at the earliest opportunity, and should not be entertained at the commencement of the trial save in a most exceptional case and on receipt of a valid explanation for the delay. In this case, the difficulty in gathering evidence due to the suspension of the third B appellant and the liquidation of PI could be accepted as a reasonable explanation for the delay even though made by way of an oral submission. Moreover, the actions had not as yet been set down for trial.

(2) The appellants had succeeded in showing that the wrong parties C were cited and that there was no contract between them and the respondent. It was the registrar of PI who issued the shares and if they were invalid, then the right party to sue would be PI and not the appellants.

(3) Section 63 of the Companies Act 1965 provides that a holder of D a share which is not valid may apply to the court for validation of the share. Thus, the respondent could resort to the court to validate the PI shares purchased by him. Stockbrokers and their servants or agents have no legal standing in law to apply for validation of shares and are mere middlemen, a conduit pipe between the buyer and the seller. E

(4) A reasonable cause of action is one with some chance of success when only the allegations in the pleadings are considered. The mere fact that the cause of action is weak and not likely to succeed is no ground for striking it out. F

(5) The words frivolous and vexatious relate to cases such as the present, which are obviously unsustainable, ie obviously bad and almost incontestably bad, as would amount to an abuse of the process of the court.

[Bahasa Malaysia summary G

Responden telah mengikat perjanjian lisan dengan perayu pertama dan kedua, iaitu dua orang remisier di syarikat broker saham perayu ketiga, untuk membeli saham Pahang Investments Public Ltd Co ('PI') yang berjumlah RM95,127.15 daripada perayu pertama dan kedua. Bagaimanapun, responden telah menerima saham daripada H Pahang Consolidated Co Ltd ('PC') dan bukan saham PI. Responden telah memfailkan saman terhadap perayu dan mengatakan, antara lain, bahawa terdapat suatu syarat tersirat bahawa perayu akan menjual saham PI yang betul dan sah tetapi saham PI itu tidak sah dan telah dikeluarkan menyalahi undang-undang; bahawa mereka telah memberi I waranti dan membuat representasi bahawa saham PI itu adalah sah dan mereka cuai dan telah melakukan fraud. Di dalam pembelaan perayu, telah dihujahkan, antara lain, bahawa perayu tidak mendorong

responden untuk mengikat perjanjian lisan itu dengan memberi waranti dan membuat representasi bahawa saham PI itu sah kerana responden telah mengikat perjanjian lisan itu atas kehendaknya sendiri dan bahawa secara alternatif, perayu pertama dan kedua hanya telah bertindak sebagai orang tengah dan ianya merupakan tanggungjawab PI untuk memastikan bahawa saham tersebut adalah sah. Perayu telah memohon di bawah A 14 k 21(1) Kaedah-Kaedah Mahkamah Rendah 1980 untuk membatalkan pernyataan tuntutan atas dasar bahawa ia tidak mendedahkan apa-apa kausa tindakan yang munasabah, adalah remeh dan menyusahkan dan selainnya adalah suatu penyalahgunaan proses mahkamah. Responden berhujah bahawa oleh kerana perayu telah berlengah-lengah apabila membuat permohonan itu, ia tidak seharusnya dibenarkan. Permohonan perayu telah ditolak oleh mahkamah sesyen dan perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Sesuatu permohonan untuk membatalkan suatu pliding seharusnya dibuat sebaik sahaja ada peluang, dan tidak sepatutnya dilayan pada permulaan perbicaraan kecuali di dalam kes yang sangat luar biasa dan di mana penjelasan yang baik mengenai kelengahan itu diterima. Di dalam kes ini, kesukaran mendapatkan bukti akibat daripada penggantungan perayu ketiga dan penyelesaian PI boleh diterima sebagai suatu penjelasan yang munasabah bagi kelengahan tersebut walaupun ia dibuat secara hujah lisan. Lagipun, tindakan-tindakan itu belum lagi ditetapkan untuk perbicaraan.

(2) Perayu telah berjaya menunjukkan bahawa pihak yang salah telah dinamakan dan bahawa tidak terdapat kontrak di antara mereka dan responden. Pihak yang mengeluarkan saham itu adalah pendaftar PI dan jika saham itu tidak sah, pihak yang sepatutnya didakwa adalah PI dan bukannya perayu.

(3) Seksyen 63 Akta Syarikat 1965 memperuntukkan bahawa seorang yang memegang saham yang tidak sah boleh memohon kepada mahkamah supaya mengesahkan saham itu. Dengan yang demikian, responden boleh mengambil jalan keluar dengan memohon kepada mahkamah supaya mengesahkan saham PI yang telah dibelinya itu. Broker saham dan pekerja atau agen mereka tidak mempunyai taraf di sisi undang-undang untuk memohon supaya saham disahkan dan adalah semata-matanya orang tengah, suatu paip pembuluh di antara pembeli dan penjual.

(4) Sesuatu kausa tindakan yang munasabah adalah suatu kausa yang mempunyai sedikit sebanyak cansa kejayaan apabila hanya pengataan di dalam pliding dipertimbangkan. Hakikat semata-mata bahawa kausa tindakan itu lemah dan tidak mungkin berjaya tidak merupakan suatu alasan untuk membatalkannya.

(5) Perkataan-perkataan remeh dan menyusahkan berkaitan dengan kes seperti ini, yang jelas tidak boleh dipertahankan, iaitu kes yang nyata tidak kukuh dan hakikat bahawa ia tidak kukuh hampir-hampir tidak dapat dipertikaikan, sehingga ia merupakan suatu penyalahgunaan proses mahkamah.]

[*Editorial Note*: The respondent has applied to the Court of Appeal for leave to appeal.]

Notes

For cases on striking out pleadings, see 2 *Mallal's Digest* (4th Ed) paras 1783–1831; [1989] Mallal's Digest 461–466; [1990] Mallal's Digest 356–367; [1991] Mallal's Digest 395–414; [1992] Mallal's Digest 330–342; [1993] Mallal's Digest 254–267.

For cases on the proper parties to be sued, see 2 *Mallal's Digest* (4th Ed) para 1654; [1990] Mallal's Digest 350; [1991] Mallal's Digest 383; [1992] Mallal's Digest 314.

For cases on sale of shares, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 349–352.

Cases referred to

A-G of the Duchy of Lancaster v London & North Western Railway Co [1892] 3 Ch 274 (refd)

Castro v Murray (1875) LR 10 Ex 213 (folld)

Drummond-Jackson v British Medical Association [1970] 1 All ER 1094; [1970] 1 WLR 688 (folld)

Dyson v A-G [1911] 1 KB 410 (folld)

Foss v Harbottle (1843) 2 Hare 461 (refd)

Halliday v Shoesmith & Anor [1993] 1 WLR 1 (folld)

House of Spring Gardens Ltd v Waite [1991] 1 QB 241; [1990] 2 All ER 990; [1990] 3 WLR 347 (refd)

Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821; [1974] 1 All ER 1126; [1974] 2 WLR 689 (refd)

Humphrys v Polak [1901] 2 KB 385 (refd)

Huo Heng Oil (EM) Sdn Bhd v Tang Tiew Yong [1987] 1 MLJ 139 (folld)

Johnston v Johnston (1884) 33 WR 239 (refd)

Krishnamurthy & Anor v Malayan Finance Corp Bhd [1986] 2 MLJ 134 (folld)

Residues Treatment and Trading Co Ltd & Ors v Southern Resources Ltd (1988) 6 ACLC 1,160 (refd)

Shaw v Shaw [1965] 1 All ER 638; [1965] 1 WLR 537 (refd)

South Hetton Coal Co v Haswell, Shotton & Easington Coal and Coke Co [1898] 1 Ch 465 (refd)

Steamship Mutual Underwriting Association Ltd v Trollope and Colls (City) Ltd (1986) 33 BLR 77 (refd)

A *Sykt Soon Theam Sdn v H'ng Chye Jin* [1975] 1 MLJ 259 (folld)
Wenlock v Moloney [1965] 2 All ER 871; [1965] 1 WLR 1238 (folld)
Wing v Burn (1928) 44 TLR 258 (refd)
Young v Holloway [1895] P 87 (folld)

B **Legislation referred to**

Companies Act 1965 s 63
Subordinate Courts Rules 1980 O 14 r 21(1)
Rules of the Supreme Court O 18 r 19 [Eng]

C *A Selvanathan* (*Kean Chye & Sivalingam*) for the first and second appellants in Civil Appeal No 12–13–93(T).
Malathi Jegadesan (*Rashid & Lee*) for the third appellant in Civil Appeal No 12–12–93(T).
VK Dasaratharaj (*Karpal Singh & Co*) for the respondent.

D **Abdul Malik Ishak J**: These appeals arose from applications made by the first and second appellants dated 4 December 1991 and by the third appellant dated 22 October 1992 under O 14 r 21(1) of the Subordinate Courts Rules 1980 ('SCR') to strike out the statements of claim in the summonses on the usual grounds that they did not disclose a reasonable
E cause of action; were frivolous and vexatious and were otherwise an abuse of the process of the court. These were appeals from the decision of the Sessions Court, Taiping, Perak ('trial court') when the trial court decided not to strike out the various statements of claim.

The facts are as follows. The respondent, an investor in the stock
F exchange market, entered into several oral agreements with the first and second appellants who were remisiers of the third appellant's stockbroking company wherein the first and second appellants agreed to sell and the respondent agreed to buy certain lots of Pahang Investments Public Ltd Co ('PI') shares totalling a grand total of RM95,127.15. The respondent received in return not PI shares but shares from the Pahang Consolidated
G Co Ltd ('PC'). This prompted the respondent to file summonses against the three appellants and it was alleged, inter alia, that it was an implied condition of the oral agreements that the appellants would sell proper and valid PI shares; that the PI shares sold by the appellants to the respondent were at all material times invalid and issued unlawfully; that the appellants
H warranted and represented to the respondent that the PI shares were valid shares and, last but by no means least, there were allegations of negligence and fraud perpetrated by the appellants. In the statement of defence, it was alleged, inter alia, that there was nothing improper in respect of the transactions between the parties as the respondent had got what he had contracted for; that at all material times the PI shares were good for
I delivery; that the appellants did not induce the respondent to enter into the oral agreements by warranting and representing that the PI shares were valid as the respondent had entered into the oral agreements at his own

behest; that in the alternative, the first and second appellants averred that they merely acted as intermediaries in the sale and purchase of the PI shares and that it was the duty of PI to ensure that the PI shares were valid, legal and good for listing or trading in the stock exchange and, last but by no means least, it was averred that the appellants did not induce the respondent to purchase the PI shares by misrepresentation. A B

In his affidavit affirmed on 29 November 1991 in support of the O 14 application, the first appellant on behalf of himself and that of the second appellant averred that as remisiers, they acted as middlemen and were not authorized to confirm the authenticity of the PI shares and that they believed that the registrar of PI was responsible for confirming the authenticity of the PI shares. The third defendant, on the other hand, affirmed an affidavit through Muhammad Nadzri Hamzah dated 15 October 1992 in support of the O 14 application and averred that as a stockbroking company, they were not responsible for confirming the authenticity of the PI share certificates and they further averred that the registrar of PI was responsible for confirming the authenticity of the PI shares. It was further averred that the Kuala Lumpur Stock Exchange ('the KLSE') had since set up a company known as the Securities Clearing Automated Network System Sdn Bhd ('SCANS') and all transactions for the sale and purchase of shares conducted by the KLSE must be through SCANS. Next, it was also averred that PI had been suspended from operating its shares on 14 October 1985 and withdrawn from the KLSE's list on 29 February 1988. C D E

It is proposed, before proceeding to consider the merits of the appellants' application for striking out, to consider a potent point raised by the learned counsel for the respondent. That point was in regard to the issue of delay. It is not disputed that the pleadings filed therein had a chequered history. It started with a statement of claim dated 13 November 1989. This was followed by the joint statements of defence by the first and second appellants dated 14 February 1990. Soon thereafter, the statement of claim was amended on 29 May 1990, which was once again re-amended on 19 September 1990. The third appellant finally filed their statement of defence on 9 November 1990. On 7 October 1991, the first and second appellants filed an amended joint statement of defence. The third appellant also filed an amended statement of defence on 7 September 1992. Finally, the respondent filed once again his re-amended statement of claim on 10 October 1992. The joint applications by the first and second appellants for striking out bore the date 4 December 1991 whereas the application for striking out by the third appellant was dated 22 October 1992. It was argued strenuously that these applications for striking out should not be entertained and the trial court rightly dismissed these applications forthwith. F G H

In *Halliday v Shoesmith & Anor* [1993] 1 WLR 1, the Court of Appeal considered the question of whether to grant an application to strike out pleadings at the opening of the trial. The facts there were that by a writ issued in 1988, the plaintiff sought an order for probate of a will drawn up in 1986, shortly after the testatrix's death, which named him as the I

A residuary beneficiary of her estate. The defendant, the testatrix's nephew, by a defence and counterclaim, contested that will on the grounds of lack of testamentary capacity and/or undue influence and sought an order for probate of an earlier will drawn up in 1984, which named him as sole beneficiary. At the outset of the hearing of the action, counsel for the B plaintiff applied to strike out certain allegations in the defence and counterclaim on the grounds that they disclosed no reasonable cause of action or were vexatious and frivolous within the meaning of O 18 r 19 of the Rules of the Supreme Court. The judge considered documentary evidence including medical reports and ordered much of the defence and counterclaim to be struck out. He held, in the result, that the plaintiff C succeeded in upholding the 1986 will. On appeal by the defendant, it was held (allowing the appeal), that an application to strike out a pleading should be made at the earliest opportunity, and should not be entertained at the commencement of the trial after the costs of preparation had been incurred save in a most exceptional case and on receipt of a valid explanation for the lateness of the applications, that in the circumstances, the judge D could not properly have exercised his discretion by ordering the defendant's pleadings to be struck out at so late a stage.

According to 1 *Supreme Court Practice 1993* at p 332:

> Although the rule expressly states that the order may be made 'at any stage E of the proceedings', still the application should always be made promptly, and as a rule before the close of pleadings. Where the statement of claim is being attacked, the application may be made before the defence is served (*A-G of Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274); but where it is sought to stay or dismiss the action, the application should not be made before the service of the statement of claim (*Wright v Prescot UDC* (1916) 115 LT 722; cf *Electrical Co v A-G for Ontario* [1919] F AC 687).

In another part of the same page, it is stated that:

> The application may be made even after the pleadings are closed (per Brett MR in *Tucker v Collinson* (1886) 34 WR 354, but was refused after the G action had been set down for trial ... (*Cross v Earl Howe* (1893) 62 LJ Ch 342; *Fletcher v Bethom* (1893) 68 LT 438).

Salleh Abas LP in *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134, crystallized the law as to when an application for an O 14 judgment could be made, in the following words [at p 135]:

H > The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed. This is the ratio decidendi in *McLardy v Slateum* (1890) 24 QBD 504. This case was followed by Raja Azlan Shah J (as he I then was) in *Comptroller-General of Inland Revenue, Malaysia v Weng Lok Mining Co Ltd* (1969) 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* (1978) 2 MLJ 267.

It is plain from these cases that striking out is entirely at the discretion of the trial court and I may add that what the appellate court should be concerned with is the exercise of that discretion by the trial court. On discretion, the salutary remarks by Danckwerts LJ in *Wenlock v Moloney* [1965] 2 All ER 871; [1965] 1 WLR 1238 should be referred to. There, Danckwerts LJ said ([1965] 2 All ER 871 at p 874; [1965] 1 WLR 1238 at pp 1243–1244):

> The position is very clearly expressed by Lord Herschell in *Lawrance v Lord Norreys* (1886–90) All ER Rep 858 at p 863; (1890) 15 App Cas 210 at p 219. He said:
>
> > 'It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.
> >
> > ...
> >
> > The position under two former rules has been incorporated in the present RSC, O 18 r 19 of the new rules. There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.'

Applying the above principles to these appeals before me, the appellants sought to explain the delay. It was submitted that the third appellant was suspended and records have not been available for evidence gathering in order to support the applications for striking out. The appellants had to proceed rather slowly in their evidence gathering exercise, more by way of piecemeal method. The matter was further compounded, so submitted the appellants, by the liquidation of PI. In my judgment, these explanations for the delay could be accepted as reasonable even though such explanations were made before me by way of an oral submission. Chong Siew Fai J accepted an oral explanation of counsel in the case of *Huo Heng Oil (EM) Sdn Bhd v Tang Tiew Yong* [1987] 1 MLJ 139. Moreover, the actions in these appeals have not been set down for trial and thus the delay in applying for striking out should not be a barrier for the appellants. I will now proceed to set out the grounds relied upon by the appellants to strike out the statements of claim.

No reasonable cause of action

It is said that a reasonable cause of action would mean a cause of action with some chance of success when only the allegations in the pleadings are being considered (*Drummond-Jackson v British Medical Association* [1970]

A 1 All ER 1094; [1970] 1 WLR 688, CA). The mere fact that the cause of action is weak, and not likely to succeed, is no ground for striking it out (*Wenlock v Moloney* [1965] 2 All ER 871; [1965] 1 WLR 1238). There are several instances where the statement of claim will be struck out and the action dismissed, eg in an action of contract if it appears that there is no
B contract between the parties or no contract valid in law; or a totally illegal contract; or the cause of action brought solely to obtain relief from the court which has no power to grant it; and, last but by no means least, where relief is sought on a ground in which no such relief could be obtained (see *South Hetton Coal Co v Haswell, Shotton & Easington Coal and Coke Co* [1898] 1 Ch 465; *Humphrys v Polak* [1901] 2 KB 385; *Shaw*
C *v Shaw* [1965] 1 All ER 638; [1965] 1 WLR 537; *Wing v Burn* (1928) 44 TLR 258 and *Johnston v Johnston* (1884) 33 WR 239, CA).

Frivolous and vexatious

These words relate to cases which are obviously unsustainable as would
D amount to an abuse of the process of the court. The courts must in their judicial discretion determine whether the proceedings are frivolous and vexatious (see *A-G of the Duchy of Lancaster v London & North Western Railway Co* [1892] 3 Ch 274). It is now trite law that the court will not permit a plaintiff to be ousted from the judgment seat, so to speak, except
E where the cause of action is obviously bad and 'almost incontestably bad' (*Dyson v A-G* [1911] 1 KB 410). The pleading must, in all the circumstances, be so obviously frivolous that to advance it forward must be an abuse of the process of the court (*Young v Holloway* [1895] P 87).

F *Abuse of the process of the court*

It is said that the process of the court must be used bona fide and properly and must not be abused. The court will always guard its machinery from being used as a means of vexation and oppression in the process of litigation (*Castro v Murray* (1875) 10 Ex 213).

G The classifications of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed. Much will depend on all the relevant circumstances and, towards this end, the considerations of public policy and the interests of justice may be relevant and material. Thus, it is an abuse of the process of the court for a party to relitigate the issue of fraud
H after it has been tried and decided by an Irish court (*House of Spring Gardens Ltd v Waite* [1991] 1 QB 241; [1990] 2 All ER 990; [1990] 3 WLR 347). It is also an abuse of the process of the court and the claim will be struck out if it is groundless and unfounded in the sense that the plaintiff does not know any of the facts to support it (*Steamship Mutual*
I *Underwriting Association Ltd v Trollope and Colls (City) Ltd* (1986) 33 BLR 77, CA).

I must at once say that the burden upon an applicant who asks that a writ of summons and the statement of claim be struck out is a heavy one.

It is indeed onerous. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the court or is frivolous or vexatious. A

Applying the aforesaid principles to the facts of these appeals, the thrust and substance of the appellants' argument was that the wrong parties were cited in the summonses. The right party, it was argued, should be PI. The question to pose would be this: Who is responsible for the issuance of the shares of a company, in particular the PI shares? It is right to say that the registrar of PI, on mandate given by the board of directors, will issue the shares. If these shares were invalid as alleged by the respondent, then the right party to sue would be PI and not the appellants for the simple reason that the latter has no part to play in the issuance of the shares. In *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821; [1974] 1 All ER 1126; [1974] 2 WLR 689, it was argued that the only legitimate purpose of the power to issue shares is to raise capital but this argument was rejected by the Privy Council as being too narrow. Their Lordships of the Privy Council refused to define in advance the exact limits beyond which directors must not go, 'since the variety of situations facing directors of different types of company in different situations cannot be anticipated' but went on to hold that 'it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist'. Though the directors have the power to issue, it must be exercised legitimately and for legitimate purposes. B C D E

Now, adverting to the remedies against improper issue of shares, it is not incorrect to say that where the directors have exercised their power to issue shares for improper purposes, it is usually a shareholder or group of shareholders who seeks to have the issue overturned by the court. This can be achieved by an application for rectification of the register or for a declaration that the issue is void as a breach of the directors' duty to the company. However, the latter course of action may run foul of the rule in *Foss v Harbottle* (1843) 2 Hare 461. That rule may be summarized as follows: 'Where a duty is owed to a company and complaint is made of breach of that duty, the company itself is the only proper plaintiff'. There are exceptions to this rule. Thus, in *Residues Treatment and Trading Co Ltd & Ors* (1988) 6 ACLC 1,160, the full bench of the Supreme Court of South Australia ruled that courts should 'recognize the standing of individual shareholders to have allotments made for improper purposes set aside'. Back home in Malaysia, s 63 of the Companies Act 1965 provides that a holder of a share which is not valid may apply to the court for validation of the share. Thus, the respondent here is not barred from resorting to the court to validate the shares purchased by him. Why didn't the respondent seek the aid of the court to validate the shares which he alleged to be invalid? The answer is quite obvious. To date, there is no official verification to show that these shares are invalid. The chairman of the KLSE in a press release dated 11 April 1988 stated in no uncertain terms that: F G H I

> The public is hereby advised that to date, there is no official statement from any of the authorities or the registrar of PIPLC (Pahang Investments Public Ltd Co) that there are shares in PIPLC which are found to be forged shares.

Incidentally, the allegation that the respondent was handed the wrong share certificates was nothing but a mere storm in the teacup. There is evidence that both PI and PC relate to one entity. PI was changed to PC in name on 10 February 1982 (see exh NKC1 at p 124 of the appeal bundle in Civil Appeal No 12–13–93(T)).

Reverting back to s 63 of the Companies Act 1965, the legislature saw it fit to allow the company that issued or allotted those shares or a holder or mortgagee of any of those shares or a creditor of that company to apply to the court to validate those shares that were improperly issued. Stockbrokers and their servants or agents (remisiers) were deliberately left out by the legislature for the simple reason that these people have no legal standing in law. They are mere middlemen, a conduit pipe between the buyer and the seller. I am fortified in my view by the passage that appeared in *Sykt Soon Theam Sdn v H'ng Chye Jin* [1975] 1 MLJ 259 where Chang Min Tat J said at p 260:

> A sharebroker is by his designation not a contracting party but is an agent who arranges for the 'marriage' of an offer to buy with an offer to sell. For this brokerage he gets a commission. *Taylor v Stray* (1857) 2 CBNS 175; 140 ER 380 and *Seymour v Bridge* (1885) 14 QBD 460 are, I consider, sufficient authorities for the proposition that once a broker had received an order from his client, his authority to complete it and so rid himself of the personal liability undertaken by him within the rules of the stock exchange cannot be revoked. The authority could of course always be revoked at any time before it had been acted upon: see *Fletcher v Marshall* (1846) 15 M & W 755, 153 ER 1055.

On the same page, further down the paragraph, his Lordship continues:

> In so far as mitigation is concerned, on the authority of *Thacker v Hardy* (1878) 4 QBD 685 CA, the broker who had bought securities for his client is under no obligation to re-sell them.

The allegations of misrepresentation, fraud and negligence allegedly perpetrated by the appellants must be read in the context of the contractual nexus between the appellants and the respondent. In the absence of the contractual nexus between the parties, these allegations fall flat to the ground. These allegations can be said to be ill-founded and totally misconceived.

For the above reasons, the appellants have succeeded in discharging the burden of showing to this court that the wrong parties were cited by the respondent, that there was no contract between the appellants and the respondent and, finally, that the cause of action was 'obviously bad' and 'almost incontestably bad'. In the circumstances, the appellants succeeded in these appeals. I ordered that:

(1) in Civil Appeal No 12–12–93(T), the appeal was allowed with costs; and

(2) in Civil Appeal No 12–13–93(T), the appeal was also allowed with costs.

The respondent is not without remedy. He can go after PC in a court of law.

Appeal allowed.

Reported by Anne Khoo